

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

vs.

No. 1:18-CR-3495-JCH

DOUGLAS SMITH

TRANSCRIPT OF PROCEEDINGS

SENTENCING HEARING

November 10, 2022

BEFORE: HONORABLE JUDGE JUDITH C. HERRERA  
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype.

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14 I N D E X

15 PAGE:

16 Certificate of Reporter

35

1 THE COURT: Good afternoon. We will go on  
2 the record in USA versus Douglas Smith, Case  
3 Number CR-18-3495.

4 And appearances, please, for the record.

5 MS. WILSON: Good afternoon, Your Honor,  
6 Novaline Wilson and with me at counsel table is Kyle  
7 Nayback on behalf of the United States.

8 THE COURT: Good afternoon.

9 MR. ELSENHEIMER: Good afternoon,  
10 Your Honor, Aric Elsenheimer and Amanda Lavin on  
11 behalf of Mr. Smith.

12 THE COURT: Good afternoon to all of you.

13 So we are here today to conclude the  
14 sentencing hearing. We got through the entirety of  
15 the hearing so I have heard argument from everybody,  
16 took up the objections, did all of that.

17 The one remaining issue has to do with the  
18 consideration of the defendant's age and the impact  
19 that could have, would have on sentencing. So I  
20 have reviewed the materials that all of you provided  
21 the Court and so at this time if you have any  
22 argument you would like to make, I will hear from  
23 you.

24 MR. ELSENHEIMER: Would you like me to  
25 begin, Your Honor?

1 THE COURT: If you would like to begin,  
2 you may. Somebody has got to start, right?

3 MR. ELSENHEIMER: I guess I will start.

4 THE COURT: You may proceed.

5 MR. ELSENHEIMER: Thank you, Your Honor.  
6 Just to, I know you know a lot about this case.

7 Just to recap, Mr. Smith is 72 years old.  
8 He has lived in Espanola his entire life and in the  
9 house he lived, virtually his entire life since  
10 elementary school. His age provides a variance, a  
11 justification for a variance in this case. The  
12 guidelines recognize the basis for variance where  
13 somebody is elderly and infirm and where home  
14 confinement can be equally efficient and less costly  
15 than incarceration, and that's the case that we have  
16 here.

17 There are a number of examples, and I  
18 refer to these in the supplement to our sentencing  
19 memorandum. But there are a number of examples  
20 where Courts have recognized age as a basis for a  
21 variance. There is *U.S. v. White*, which is a Tenth  
22 Circuit case citing defendant's advanced age, who  
23 was 76 in deciding to vary downward from the  
24 guidelines.

25 There is *U.S. v. Anderson* this is a

1 District Court case from Arkansas for 56-year-old  
2 defendant for a variance based on age, health  
3 problems, lack of criminal history and substance  
4 abuse problems.

5           There is *U.S. v. Flemister*, which is a  
6 Pennsylvania case noting a downward variance for  
7 somebody's age and where there is an overstatement  
8 of criminal history. We don't even have an  
9 overstatement of criminal history because Mr. Smith  
10 has no criminal history.

11           And lastly *Bellamy*, which is a District  
12 Court case in Minnesota that is a compassionate  
13 release issue but granting compassionate release  
14 based on somebody's age.

15           There are a host of other examples. These  
16 are four illustrative examples of how age is a basis  
17 for a variance.

18           Mr. Smith is 72 years old and what we are  
19 talking about here is punishment. Rehabilitation is  
20 not a sentencing at issue, really, deterrence isn't  
21 at issue in this case. Mr. Smith has been out on  
22 conditions of release without incident for  
23 three years, gosh, no, I'm sorry, four years now.  
24 What we are talking about is punishment and there  
25 are other alternatives to incarceration for

1 punishment. There is home confinement that can  
2 serve as a significant restriction on Mr. Smith's  
3 liberty that can accomplish the purposes of  
4 sentencing and that are justified based on his age.

5           There is two, I think, overwhelming  
6 factors that support a variance because of  
7 Mr. Smith's age. First of all is what he would face  
8 in the Bureau of Prisons if incarcerated. He would  
9 be going into the Bureau of Prisons with zero  
10 experience in custody, zero experience in  
11 understanding the routines and the culture of  
12 incarceration. And that increases his exposure and  
13 vulnerability to being taken advantage of by other  
14 inmates, other inmates who are far more savvy and  
15 aware of the culture of prison that would be able to  
16 take advantage of Mr. Smith.

17           He is somebody who has not spent much time  
18 even outside of Espanola let alone in the hardened  
19 confines of jail or prison. He is not going to be  
20 able to understand that world and he is going to be  
21 taken advantage of.

22           We reference these in our sentencing  
23 memorandum. There are even Department of Justice  
24 statistics that discuss how somebody of an advanced  
25 age, and by advanced age what they are talking about

1 is over 50. In somebody like Mr. Smith at 72 he is  
2 going to be taken advantage of. It is that  
3 vulnerability his age and his complete lack of  
4 experience in incarceration where he will be taken  
5 advantage of and that justifies a variance from the  
6 guidelines.

7 And part of that is also the fact that  
8 going into a new environment is going to increase  
9 significantly the stress that Mr. Smith is under.  
10 We gave to the Court medical records that we just  
11 recently received this week. I gave them to the  
12 Probation Office and I sent them to your CRD, but  
13 what I want to point out in there is Mr. Smith has  
14 tachycardia, which is a rapid heart rate. That is  
15 something that he's recently experienced. We don't  
16 know the underlying cause, but I am pretty confident  
17 in saying it is because he is stressed about going  
18 into prison.

19 What we know about somebody who is at an  
20 advanced age is that stress and health problems  
21 compound each other, once one health problem starts,  
22 other health problems follow.

23 Mr. Smith going into prison is going to be  
24 a significantly higher stress than others going into  
25 prison who are even younger. Because of his age,

1 less able, less resilient to the health problems he  
2 is going to run into in prison. So that increase in  
3 stress is going to lead to additional health  
4 problems. I point that out along with his  
5 vulnerability because it highlights the fact that he  
6 is going into prison at an age where most people  
7 don't move at all, most people don't make any  
8 changes in their lives. He is making a change from  
9 something that he has always known, one place that  
10 he has always known to something he has zero  
11 familiarity with. And that is going to increase his  
12 vulnerability to others, the stress just in that  
13 change in life and the fact that that stress is  
14 going -- and we know that stress causes health  
15 problems. People who are stressed out in their life  
16 have more health problems. It is going to compound  
17 his health problems and justifies a variance to  
18 something that is punishment but less severe than  
19 the punishment that somebody who is 72 is going to  
20 experience in custody.

21 He has a lifetime of good behavior. He is  
22 peaceful. He does not have a background that will  
23 help him transition into a life in prison, and that  
24 justifies a variance. I understand any situation  
25 where we were concerned about keeping the community



1 safe where prison might be appropriate, but that is  
2 not the case that we have here. There is no concern  
3 about the community or about deterrence or about  
4 protection of anybody else.

5 Mr. Smith is a peaceful, law-abiding  
6 person who made a mistake and is in this situation  
7 because of a terrible accident. It wasn't, it is  
8 not something that has characterized his life. In  
9 fact, it is a deep aberration from everything else  
10 in his life. What we are talking about in this case  
11 is not deterrence, it is not rehabilitation, it is  
12 punishment.

13 If punishment can be accomplished in a  
14 less -- in something, in an alternative form such as  
15 home confinement, the guidelines and, I'm sorry,  
16 3553 requires the Court to consider that as an  
17 alternative to punishment if it can be, if it  
18 accomplishes the goals of sentencing.

19 And home confinement in this case imposes  
20 punishment but it is less severe than what Mr. Smith  
21 would face in prison. It accomplishes the goals of  
22 sentencing because it sends a message that this is  
23 not, that those in Mr. Smith's situation have to be  
24 careful but it doesn't do so in a way that is going  
25 to potentially put Mr. Smith at risk of being

1 victimized by others in prison and a risk of health  
2 problems that he is going to run into when he gets  
3 into prison. It is going to curtail his liberty in  
4 a way that punishes him but punishes him in a way  
5 that is just under 3553.

6 I think a sentence of home confinement 12  
7 months, 18 months of home confinement is a  
8 significant deprivation of liberty and is called for  
9 by 3553 when we look at all of the factors. What  
10 led to this case, the fact that Mr. Smith was not  
11 out looking for trouble, he was home in bed. And  
12 the fact that he is 72 years old with no criminal  
13 history. An absolutely aberrant situation. He did  
14 not plan on this, he did not intend this to happen.  
15 It is completely aberrant and given his age and what  
16 he would face if he were to go into prison, it  
17 justifies a sentence to home confinement, 12 months,  
18 18 months.

19 We will leave that to the Court's  
20 discretion, but home confinement is punishment but  
21 it is punishment that is fair and just under 3553(a)  
22 that accomplishes the purposes of sentencing and it  
23 is not greater than necessary.

24 And I would ask Your Honor to consider and  
25 to impose a sentence of home confinement. It is

1 fair in this case. This is a very difficult case.  
2 It is difficult for everybody involved but sending  
3 Mr. Smith to prison is not the way that the  
4 Sentencing Reform Act contemplates punishing  
5 somebody in situations like this given their age and  
6 everything that preceded that; no criminal history,  
7 the facts and circumstances of this case and the  
8 consequences to Mr. Smith if he goes to prison and  
9 the vulnerability that he will face with others  
10 there having no experience in prison and the  
11 potential just stress and health consequences he  
12 will face in prison.

13 Thank you.

14 THE COURT: Thank you, Mr. Elsenheimer.

15 Ms. Wilson.

16 MS. WILSON: Your Honor, just to address a  
17 few things that defense brought up. I realize when  
18 Your Honor does sentence people to Federal prison,  
19 sometimes it is people's first time to go to Federal  
20 prison.

21 The fact that Mr. Smith doesn't have any  
22 experience in that regard shouldn't really be a  
23 consideration before this Court. It is stressful.  
24 I can only guess what that must feel like, and I am  
25 sure other folks who go to prison feel that same

1 stress. But to the extent that any health problems  
2 that may arise from that, of course, the  
3 United States has no objection that defendant be  
4 sent to a Federal medical facility.

5 We have included a number of exhibits on  
6 our response to defendant's request so the Court is  
7 comfortable with what resources are available at BOP  
8 specifically addressing not only his eye vision that  
9 was mentioned in defendant's pleading, but also the  
10 resources that are available for somebody who is an  
11 older person in prison. They have a policy, there  
12 are a number of resources that we included for the  
13 Court's consideration in, you know, reaching out to  
14 the BOP in determining what resources they had  
15 available.

16 They are aware that Mr. Smith is being  
17 sentenced and that this proceeding is taking place.  
18 And to the extent it would be helpful, you know, if  
19 we can put something in the Court's order that he go  
20 to a Federal medical facility but we can also -- BOP  
21 has mentioned to me that they will be sure that that  
22 facility he goes to is aware of his health  
23 conditions, whatever they may be, and that he  
24 receives the care that he needs. I have been  
25 reassured by BOP staff that that is something that

1 we can put in the order and that his healthcare will  
2 be taken care of.

3 In response to defendant's arguments about  
4 deterrence, we would argue that it isn't just  
5 punishment. There is an aspect of deterrence in  
6 Mr. Smith's sentence, both general and specific.  
7 The defendant, as Your Honor is aware, did admit to  
8 shooting at other people on his property. In this  
9 instance, of course, it did cost Ms. Gallegos her  
10 life, but, you know, there is that prior act. We  
11 are concerned and we do believe a custodial sentence  
12 is appropriate.

13 The United States maintains that defendant  
14 has not shown that his age or his health are  
15 exceptional, arise to the level to warrant a  
16 variance. Again, the BOP is fully capable of  
17 providing the defendant the care he needs and also  
18 can address his concerns with vulnerability.

19 Some of the documents we included for the  
20 Court include, you know, folks that can help people  
21 who are disabled in custody. And, again, you know,  
22 if the Court has any questions about any of the  
23 exhibits the United States provided, we would rely  
24 on our pleadings for our response to defendant's  
25 expert about his concerns about defendant's age and

1 vulnerability. We just believe that the BOP is  
2 capable of taking care of Mr. Smith. They take care  
3 of people with far worse conditions and people who  
4 are elderly on a daily basis.

5 And with the information that we provided  
6 for the Court, we hope that you have a good  
7 understanding of what is there and that you would be  
8 comfortable sentencing him to a custodial sentence.

9 Happy to answer any questions you might  
10 have, Your Honor.

11 THE COURT: Thank you, Ms. Wilson.

12 Anything further?

13 MR. ELSENHEIMER: Two things in response  
14 very quickly, Your Honor. First of all just to be  
15 clear, our argument isn't that the BOP doesn't have  
16 the capacity to take care of these things. Our  
17 argument and the justification based on Mr. Smith's  
18 age is that Mr. Smith going to the Bureau of  
19 Prisons, given his age complete lack of criminal  
20 history, total inexperience with the prison will  
21 lead to health problems and problems to him based on  
22 his vulnerability to victimization.

23 It is not that his conditions as they are  
24 can't be addressed by the Bureau of Prisons, it is  
25 that he is going to have adverse health

1 consequences, adverse life consequences by going  
2 into incarceration at his age.

3 The second thing I want to point out is  
4 that -- the second thing I want to mention about  
5 what the Government just said -- I am drawing a  
6 blank on it right now.

7 THE COURT: Talked about first time,  
8 everybody has a first time, health, deterrence is an  
9 issue. BOP, exhibits to their response. Nothing?  
10 Not jogging it?

11 MR. ELSENHEIMER: Well, I guess it was  
12 just one thing I had to point out, which is that --  
13 I want to make sure. Sure, the BOP can handle what  
14 he has right now but he will have adverse  
15 consequences to his health and to his lifestyle by  
16 going into the Bureau of Prisons.

17 And by lifestyle I mean his victimization  
18 by others who are far more savvy. Folks who have  
19 spent their life in prison are extraordinarily  
20 savvy. You have to be on constant guard with them.

21 Mr. Smith has none of that. He is not  
22 experienced in any way. He is not somebody who has  
23 spent his life traveling and understands. He spent  
24 his life living in his home in Espanola and that  
25 justifies a variance in this case.

1           And age, oh, the last thing, I know what I  
2 wanted to say. The Government there is exceptional  
3 reasons that we need. Age itself is identified in  
4 3553 as a basis that the Court has to consider. It  
5 is identified in the guidelines as a basis. It is  
6 identified in case law as a basis for a variance,  
7 age itself.

8           It is inherently a possible basis for a  
9 variance, particularly in a situation like  
10 Mr. Smith's. We don't have to show an analysis of  
11 exceptional circumstances or reasons, it is the age  
12 alone and the consequences based on someone's age.  
13 That is the justification for a variance.

14           THE COURT: I am looking at 3553 to see  
15 where age specifically is.

16           MR. ELSENHEIMER: It is history and  
17 characteristics, Your Honor.

18           THE COURT: Well, history and  
19 characteristics, yes, I agree with you but I don't  
20 see age.

21           All right. Anything else?

22           MR. ELSENHEIMER: No.

23           THE COURT: Well, I have reviewed all of  
24 the material that you-all have supplied on this  
25 issue of age and of variance. I have, I told you



1 when we were together last time that I was inclined  
2 to go with a guideline sentence at the low end.

3 As the hearing progressed I allowed the  
4 defense to submit any other materials or argument on  
5 the issue of age because, as I pointed out at our  
6 last hearing, while age was mentioned by the defense  
7 in the sentencing memo, there was really nothing  
8 that was particularly specific about age and so now  
9 the defense has provided more information.

10 Despite that information, I continue to  
11 believe that a custodial sentence is appropriate at  
12 the low end of the guidelines. I looked at the age  
13 issue very carefully because I can certainly  
14 understand that a custodial sentence for someone of,  
15 you know, a lot of ages, including 72, would be  
16 difficult and so I wanted to give every  
17 consideration to the defendant's request.

18 And I did look at all the issues that were  
19 identified. I looked at the report from the expert  
20 who, by the way, noted that the older population had  
21 increased significantly since 2009. I believe he  
22 said 25 percent so it was quite, it was a jarring  
23 number to see that the population of the older  
24 inmates had grown so dramatically.

25 But anyway, I looked through all of that.

1 I looked through the materials that the Government  
2 provided, and I continue to believe that the Bureau  
3 of Prisons is equipped to address issues that  
4 involve not only an inmate's age but also any health  
5 conditions.

6 Now the only health condition that I was  
7 aware of before yesterday was macular degeneration.  
8 I believe that the Bureau of Prisons is equipped to  
9 handle inmates who have vision issues, including  
10 macular degeneration.

11 Yesterday, I received a packet of  
12 materials from defense counsel regarding an  
13 emergency department visit to Presbyterian, I  
14 believe, and the defendant went to the emergency  
15 room about a week or so after we were together last  
16 time.

17 And from my review of the notes it looks  
18 like the defendant had some rapid heartbeat and was  
19 not, was asymptomatic at the time of the visit. The  
20 defendant indicated that he was there in part  
21 because he knew of someone who had similar rapid  
22 heartbeat and ultimately needed a pacemaker, so he  
23 was concerned and wanted to be examined.

24 And that is -- the packet of materials is  
25 fairly thick in large part because of some of the

1 testing that was done. But I didn't see any  
2 follow-up. I am not aware of any treatment that was  
3 prescribed. All of that is to say that I agree that  
4 Mr. Smith is 72 years old and I agree that he has a  
5 very -- his life experience is a bit limited in the  
6 sense that he has lived in Espanola almost his  
7 entire life and lived in the same house for at least  
8 60 years, maybe longer. And I am, I can only  
9 imagine that going to prison would be stressful for  
10 him, and I understand all of that.

11 So when we talk about 3553, nature and the  
12 circumstances of the offense and the history and the  
13 characteristics of the defendant, you know, that is  
14 3553(a)(1), so I have to look at the nature and the  
15 circumstances of the offense, too.

16 Here the jury concluded that the defendant  
17 recklessly shot at MG, who was on his property and  
18 she was shot in the temple and she died. So the  
19 jury determined that the defendant was reckless,  
20 acted without due caution and circumspection, as the  
21 jury instruction states. While it was not extreme  
22 recklessness, it was reckless. I think I noted at  
23 the last hearing that even if the defendant did not  
24 intend to shoot a person and kill that person, his  
25 shooting at head level was certainly reckless. And

1 again somebody died.

2           When I consider the nature and the  
3 circumstances of the offense, you know, I can think  
4 of a lot of offenses where a 72-year-old would  
5 probably be, it would be appropriate for something  
6 less than incarceration.

7           But under these circumstances, I believe  
8 that the offense was of the most serious nature.  
9 When people die, that is a most serious offense.

10           Now, I understand also when I consider the  
11 nature and the circumstances of the offense, I know  
12 this was at 1:00 in the morning. I know that the  
13 defendant was in his own home. I know he was  
14 awakened to what he thought may be a prowler. But  
15 still, when someone shoots a weapon capable of  
16 killing someone, I think shooting at head level is  
17 of the, as I have already said, of the most serious  
18 order.

19           When I take into consideration the  
20 defendant's history and characteristics, yes, he is  
21 72, he has no criminal history, he has no other  
22 conviction. I know that he lives alone. I know  
23 that he has lived in the same home for many years.  
24 I know that he has provided some information of  
25 macular degeneration. But at the time he was

1 interviewed by Probation, the PSR said he had no  
2 known medical or mental health conditions. So it  
3 did not seem as though the macular degeneration was  
4 anything that was disqualifying or impeding his  
5 getting around.

6 I note that the medical records that were  
7 provided suggested that the treatment for that was  
8 glasses. So, again, I am not seeing anything that  
9 is beyond the Bureau of Prisons' ability to treat.

10 You know, as I look at the defendant's  
11 age, I looked at the cases that were cited. The  
12 *White* case from the Tenth Circuit was not a case  
13 where somebody died. It was not an involuntary  
14 manslaughter. It was failing to update sex offender  
15 registration. I can envision many kinds of cases,  
16 as I said earlier, where somebody who is age 72  
17 could be appropriately punished short of a custodial  
18 sentence and I suppose if the defendant was here on  
19 a single count of failing to update his sex offender  
20 registration, that I might consider a noncustodial  
21 sentence.

22 The other cases that were cited are  
23 certainly examples of someone's age being taken into  
24 account in granting a variance, but once again, the  
25 count of conviction was much different.

1           In the *Flemister* case, it was possession  
2 and distribution of heroin and cocaine base.

3           In *Bellamy* it was conspiracy to distribute  
4 heroin. And in that case the individual was 69 and  
5 in poor health where the defendant here does not  
6 appear to be in poor health, though he is 72, but  
7 again the cases that were provided are not similarly  
8 situated defendants other than the fact of age.

9           So in looking at the 3553 factors, I look  
10 at the need for the sentence imposed to reflect the  
11 seriousness of the offense, promote respect for the  
12 law and provide just punishment for the offense.

13           And I don't need to be overly repetitious,  
14 but as I said already, MG died, was shot in the  
15 temple. Again, one of the most serious offenses,  
16 that I think does call for punishment that includes  
17 incarceration.

18           Deterrence, I, you know, I know there is a  
19 disagreement. The Government believes that  
20 deterrence is a factor because the defendant has  
21 shot at or near or at the time of other intruders on  
22 his property. I really don't know that deterrence  
23 is a major issue for Mr. Smith. I agree that he has  
24 let us know that he has used his gun to scare other,  
25 at least one other person away.

1           And, again, I think I pointed out last  
2 time, I understand that he has property, it is in a  
3 part of our State that, I guess, has more than its  
4 fair share of drug problems and people that may be  
5 passing through his property even though it is a  
6 motel or was a motel. It is not a motel that is  
7 open for business and surely the people that he has  
8 tried to chase off his property were not there  
9 because they intended to rent a room from him.

10           So, you know, the deterrence is not one of  
11 the weightier issues in my assessment of the 3553  
12 factors.

13           Protection of the public from further  
14 crimes of the defendant, he has a crime-free history  
15 and so, I am concerned about protecting the public,  
16 but it is not like the defendant has a history of  
17 harming other people. And this one crime, this one  
18 conviction is serious, yes, but we would not have  
19 allowed him to be out on conditions of release if I  
20 felt that the public was in danger.

21           Looking at the kinds of sentences  
22 available I do note that -- I have looked at the  
23 guideline range, certainly that tells me about a  
24 sentence, a range of incarceration that is  
25 available. I know the defense has asked for

1 probation.

2           The PSR says at Paragraph 59 that  
3 probation is not permitted for a Zone D offense,  
4 which is where this one -- I am not saying I would  
5 grant probation anyway, I am just telling you that I  
6 have considered what is available, what kinds of  
7 sentences are out there.

8           I have considered the need to avoid  
9 unwarranted sentencing disparities. I frankly don't  
10 see that imposing a low end guideline sentence  
11 results in unwarranted sentencing disparities.

12           I know age is an issue, but even the cases  
13 the provided by the defense do not address a  
14 situation where someone died, involuntary  
15 manslaughter.

16           So I looked at the age issue and, by the  
17 way, I did note that there was discussion in some of  
18 the materials about recidivism not being a major  
19 concern for older inmates. And my only observation  
20 on that point is that when this crime was committed,  
21 the defendant, I believe, was 68 years old. So we  
22 are already much older than what the materials would  
23 tell us is a typical age for recidivism.

24           So my only point is, yes, the defendant is  
25 72. Yes, it is a hard row to hoe, I get that. But



1 on the other hand he was 68 when he committed this  
2 crime so it is not like he was a spring chicken when  
3 the crime was committed.

4           So I am, so what I am saying is I have  
5 given this very careful consideration. I think that  
6 taking everything into consideration, a custodial  
7 sentence is the appropriate one for this case. I  
8 think that if the defendant doesn't seem to be  
9 suffering any imminent medical conditions. I know  
10 that counsel has argued that the stress and the  
11 burdens of incarceration could certainly lead to  
12 deteriorating health. And while I understand that,  
13 at this point, anyway it is a bit speculative and if  
14 that were to occur the BOP is well equipped to  
15 handle medical issues.

16           And, secondly, I would assume knowing  
17 defense counsel and how diligent they are, that if  
18 something came along that would merit some motion or  
19 early release, I would not be surprised to see such  
20 a motion should there be sufficient support for it.

21           So those are my observations. I am not  
22 going to grant a variance based on age, and my  
23 intention is to impose a low end guideline sentence  
24 and recommend to BOP that they send him to a Federal  
25 medical center and take into consideration his age.

1 Anything else before I pronounce sentence?

2 MS. WILSON: Not from the Government.

3 Thank you, Your Honor.

4 MR. ELSENHEIMER: Your Honor, if I may  
5 only for purposes of the appeal and just for the  
6 record, if I may. We object to the sentence on both  
7 procedural and substantive grounds. We believe that  
8 there are obvious reasons for a variance from the  
9 sentencing guideline range, and imposing a guideline  
10 sentence is not sufficiently taking into  
11 consideration a lot of the factors that Your Honor  
12 mentioned. We believe those factors justify a  
13 variance and on that ground we object to the  
14 sentence. But, otherwise, I just want to say that  
15 for the record.

16 THE COURT: Sure. So at this time I will  
17 invite you to the podium.

18 The last time we were together I heard  
19 from everybody and I gave Mr. Smith an opportunity  
20 to address the Court, which he did. And if there is  
21 anything else that you want to say, Mr. Smith, I am  
22 happy to hear from you.

23 THE DEFENDANT: I have nothing else to  
24 say.

25 THE COURT: All right. So with that,

1 then, I will pronounce sentence.

2 The Court adopts the Presentence Report  
3 Factual Findings. The Court has considered the  
4 sentencing guideline applications. The Court has  
5 also considered the sentencing factors that are set  
6 forth at 18 United States Code Section 3553(a)(1)  
7 through (7).

8 The offense level is 18 and the criminal  
9 history category is 1. The guideline imprisonment  
10 range is 27 to 33 months.

11 The Court notes the defendant fired four  
12 shots at MG, striking her in the temple causing her  
13 death.

14 So as to indictment 1:18-CR-03495-001 JCH,  
15 the defendant, Douglas D. Smith is committed to the  
16 custody of the Bureau of Prisons for a term of 27  
17 months.

18 The Court will recommend to the Bureau of  
19 Prisons that the defendant serve his sentence at a  
20 Federal medical center.

21 The Court will also recommend to the  
22 Bureau of Prisons that in classifying him, the Court  
23 recommends the most minimal status of confinement  
24 that the defendant qualifies for. And also  
25 recommends that the Bureau of Prisons take into

1 account the defendant's age, both in his confinement  
2 and also in any programming.

3           The defendant is placed on supervised  
4 release for a term of two years. The defendant must  
5 comply with the mandatory and standard conditions of  
6 supervision. The following special conditions will  
7 also be imposed.

8           You must complete 40 hours of community  
9 service during your term of supervised release. The  
10 probation officer will supervise your participation  
11 in the program by approving the program, which  
12 agency, which location, frequency of participation,  
13 et cetera. You must provide written verification of  
14 completed hours to the probation officer, and this  
15 condition is imposed in lieu of a fine.

16           You must submit to substance abuse testing  
17 to determine if you have used a prohibited  
18 substance. Testing shall not exceed more than 60  
19 tests per year and testing may include urine  
20 testing, wearing of a sweat patch and/or any form of  
21 prohibited substance screening or testing. You must  
22 not attempt to obstruct or tamper with the substance  
23 abuse testing methods. You may be required to pay  
24 all or a portion of the cost of the testing.

25           You must submit to a search of your

1 person, property, residence, vehicle, papers,  
2 computers, other electronic communications or data  
3 storage devices or media or office under your  
4 control.

5           The probation officer may conduct a search  
6 under this condition only when reasonable suspicion  
7 exists, in a reasonable manner, and at a reasonable  
8 time for the purpose of detecting firearms, deadly  
9 weapons, illegal substances or illegal contraband.

10           You must inform any residents or occupants  
11 that the premises may be subject to a search.

12           You must not use or possess alcohol. You  
13 may be required to submit to alcohol testing that  
14 may include urine testing, a remote alcohol testing  
15 system and/or an alcohol monitoring technology  
16 program to determine if you have used alcohol.

17           Testing shall not exceed more than four  
18 tests per day.

19           You must not attempt to obstruct or tamper  
20 with the testing methods. You may be required to  
21 pay all or a portion of the cost of the testing.

22           You must not knowingly purchase, possess,  
23 distribute, administer or otherwise use any  
24 psychoactive substances including, for example,  
25 synthetic cannabinoids, synthetic cathinones,

1 et cetera, that impair your physical or mental  
2 functioning whether or not it is intended for human  
3 consumption. These conditions are imposed due to  
4 the nature of the instant offense and the  
5 defendant's restrictions from possessing firearms,  
6 and ammunition as well as his history of alcohol and  
7 marijuana use.

8           You must not communicate or otherwise  
9 interact with the victim's family in this case,  
10 either directly or through someone else without the  
11 prior approval of the probation officer. And this  
12 condition is imposed to protect the victim's family  
13 from any unwanted contact.

14           The Court finds that the Mandatory  
15 Restitution Act of 1996 is applicable in this case,  
16 however, no claim for restitution has been made by  
17 the victim's family in this case, therefore, none  
18 will be ordered.

19           Based on the defendant's lack of financial  
20 resources, the Court will not impose a fine or a  
21 portion of a fine, however, in accordance with U.S.  
22 Sentencing Guideline Section 5E1.2(e), the Court has  
23 imposed as a special condition that the defendant  
24 complete community service.

25           The Court concludes that the total

1 combined sanction without a fine or alternative  
2 sanction, other than the completion of -- the  
3 defendant's completion of community service is  
4 sufficiently punitive.

5 The defendant will pay a special  
6 assessment of \$100, which is due immediately.

7 The Court will permit voluntary surrender  
8 in this case. The defendant is not a flight risk or  
9 a danger to the community, so voluntary surrender  
10 will be granted.

11 And lastly pursuant to 18 United States  
12 Code Section 3742(a), within four days of the entry  
13 of judgment, you have the right to appeal the final  
14 sentence of this Court. You have the right to apply  
15 for leave to appeal in forma pauperis if you are  
16 unable to pay the cost of an appeal.

17 So with that I will ask counsel, is there  
18 any reason that sentence should not be imposed as I  
19 have stated it?

20 Ms. Wilson?

21 MS. WILSON: No, Your Honor, not from the  
22 Government. Just a question clarification, though.  
23 I know you did mention that self-surrender is  
24 available. Is there a time period associated with  
25 that?

1           THE COURT: Good point. I will ask you to  
2 report to the U.S. Marshals Service immediately  
3 after this proceeding in order to make arrangements.  
4 Typically I require self-surrender in about a 60-day  
5 period.

6           Is that what would you recommend?

7           THE PROBATION OFFICER: Yes, Your Honor,  
8 probation would recommend 60 days.

9           THE COURT: So I will recommend 60 days.

10          MR. ELSENHEIMER: And just can I clarify,  
11 it will be self-surrender at the facility that he is  
12 designated, correct?

13          THE COURT: Well, I believe that he would  
14 work with the Marshals Service on that.

15          MR. ELSENHEIMER: That is usually my  
16 experience as well.

17          Can I ask in terms of the recommendation  
18 of FMC, Federal Medical Center, could the Court also  
19 include in that recommendation if the Bureau of  
20 Prisons can't comply with that, that they notify the  
21 Court? I ask for that because that way we would be  
22 able to be aware of it and could make sure that  
23 whatever facility he is going to has Mr. Smith's  
24 medical records and things like that. I am told to  
25 ask to include that, it is something for the BOP.



1 That is when we get notification before he is  
2 designated.

3 THE COURT: All right. So what you are  
4 saying is you want it to include language that if  
5 the defendant, I mean, if the Bureau of Prisons is  
6 unable to place the defendant at a Federal medical  
7 center, that you want the Bureau of Prisons to let  
8 the Court know?

9 MR. ELSENHEIMER: Yes.

10 THE COURT: I am agreeable to that.

11 MR. ELSENHEIMER: Thank you.

12 MS. WILSON: I think that is fine. With  
13 my communication from the BOP, it seems to me that  
14 if there is specific language related to the types  
15 of issues that are age-related macular degeneration,  
16 for example, and now this SVT that is arising, that  
17 that is something that they would be cognizant of so  
18 perhaps the order could include those concerns that  
19 we have now.

20 THE COURT: That is a good suggestion.  
21 The reason that I am recommending the Federal  
22 medical center, we will put in there not only age  
23 but also medical conditions of macular degeneration.  
24 And I don't know exactly whether to label, what  
25 specifically to label the heart issue as, but as

1 long as I indicate that there is a heart issue that  
2 we want treated, I think that should suffice.

3 MR. ELSENHEIMER: I think so.

4 THE COURT: All right. I will do that,  
5 yes.

6 Anything else, then? Any other  
7 suggestions before I --

8 MR. ELSENHEIMER: I didn't answer your  
9 main question. Aside from the objections we have  
10 already made for the record, no.

11 THE COURT: All right. So with that,  
12 then, the Court will order sentence imposed as  
13 stated.

14 And I wish you good luck, Mr. Smith, and  
15 we'll be in recess.

16 (Proceedings concluded at 2:25 p.m.)  
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## 1 REPORTER'S CERTIFICATE

2 I certify that the foregoing is a correct  
3 transcript from the record of proceedings in the  
4 above-entitled matter. I further certify that the  
5 transcript fees and format comply with those  
6 prescribed by the Court and the Judicial Conference  
7 of the United States.

8 Date: November 10, 2022

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